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March 5, 2007

VIA HAND DELIVERY

REDACTED – FOR PUBLIC INSPECTION

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket No. 06-172: In the Matter of Petitions of the Venzon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas

Dear Ms. Dortch:

Broadview Networks, Inc., Covad Communications Group, NuVox Communications and XO Communications, LLC, through counsel, hereby submit for filing with the Commission their initial Comments on the above-referenccd Petitions of the Verizon Telephone Companies. Please note. the attached submission is redacted for public inspection, in accordance with the Second Protective Order in this proceeding. **A HIGHLY CONFIDENTIAL** version of the initial Comments also has been submitted to the Commission Secretary, and to Mr. Gary Remondino of the Wireline Competition Bureau. under separate cover.

Please feel free *to* contact the undersigned counsel at (202) 342-8625 if you have any questions, or require further information

Respectfully submitted,

Brett Heather Freedson

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas	)	WC Docket No. 06-172

COMMENTS OF BROADVIEW NETWORKS, INC., COVAD COMMUNICATIONS GROUP, NUVOX COMMUNICATIONS, AND XO COMMUNICATIONS, LLC

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TABLE OF CONTENTS

SUMMARY

The 1996 Act allows the Commission to forbear from applying certain provisions of the 1996 Act, or certain of its rules and regulations, only if the Commission affirmatively finds that each of the requirements established by Congress is satisfied, for each of the markets within which forbearance is requested. Under section 10, a grant of forbearance relief is lawful if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that that charges, practices, classification or regulations.. . are just, reasonable, and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> *(3)* forbearance from applying such provision or regulation is consistent with the public interest.

Importantly, the Commission's public interest analysis also must address whether a grant of forbearance will promote competitive market conditions, or otherwise will enhance competition among providers of telecommunications services. The 1996 Act places the full burden of proving that forbearance relief is warranted on the petitioning party, and does not obligate the Commission to consider evidence not pled by the petitioner.

The Verizon Petitions do not support a grant of forbearance by the Commission, and should be summarily dismissed. The legal arguments made by Verizon inappropriately rely on the market-specific framework set forth in the Commission's confidential *Omaha Forbearance Order,* and effectively deny interested parties a meaningful opportunity to evaluate whether the Verizon Petitions, in fact, justify a finding that ongoing unbundling and dominant carrier regulations are not necessary to ensure that Verizon's charges and practices are just and reasonable and likewise arc unnecessary for the protection of consumers. Furthermore, the supporting "data" presented in the Verizon Petitions includes E911 listings disclosed to the

Commission by Verizon in violation of federal and state laws. Moreover, this data does not accurately reflect the nature and scope of competition within the wire centers for which forbearance is requested by Verizon. Similarly, other evidence proffered by Verizon, including marketing statements by would-be service providers, is not sufficiently detailed to demonstrate the existence, on a wire center-specific basis, of actual facilities-based competition within each of the six MSAs that are the subject of the Verizon Petitions.

In addition to the facial shortcomings of the Verizon Petitions, each of the forbearance claims raised by Verizon fail on the merits. A grant of forbearance by the Commission is lawful only if the Verizon Petitions demonstrate that substantial actual facilities-based competition exists for each relevant product market, and within each relevant geographic market. Contrary to Commission precedent, the Verizon Petitions rely only on MSA-wide, statewide, and nationwide information; Verizon does not proffer any of the wire center-specific data necessary to support its forbearance claims. Moreover, the Verizon Petitions improperly rely on general statistical information, including line loss and market coverage figures, without providing any data regarding the actual market presence of competing telecommunications service providers.

With regard to Verizon's requests for relief from Part 61 dominant carrier tariffing requirements, dominant carrier requirements under Section **214** of the Act and Part 63 of the Commission's rules, and the Commission's *Computer III* requirements, including CEI and ONA requirements, the Verizon Petitions lack ***any*** analysis of the statutory requirements of section 10. Significantly, the Verizon Petitions do not address whether Verizon maintains market power within the wire centers subject to its forbearance requests, nor do the Petitions discuss supply and demand elasticities, or Verizon's costs, resources, structure and size within

those markets. Absent any such analysis, a grant of forbearance by the Commission for those non-section 251 dominant carrier obligations is not justified.

The Commission must consider whether a grant of forbearance would leave providers of competing telecommunications services without meaningful wholesale alternatives, including the network facilities and services that Verizon must offer pursuant to section 271 of the 1996 Act. Verizon has sought to evade its section 271 obligations through repeated challenges to state commission oversight, including requirements for the tariffing of section 271 network elements and services. Moreover, Verizon fails to negotiate in good faith commercial contracts that govern the rates, terms and conditions of its section 271 offerings. At bottom, Verizon has not shown that its treatment of its obligations under section 271 would provide a sufficient backstop *to* protect consumers and competition if section 251(c)(3) unbundling were to be granted by the Commission.

It is also clear that the Verizon Petitions are not consistent with the public interest, and therefore do not satisfy the third prong of the section 10(a) test. Verizon offers no evidence that the regulations at issue are hindering its ability to compete. Rather, despite the costs of unbundling, competition and consumer interests will continue to benefit from unbundling throughout the six MSAs. Indeed, the evidence is compelling that competitive conditions in these MSAs are such that continued unbundling is required because market forces alone cannot be relied upon to sustain competition. In making its public interest determinations, Section 10(b) requires the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. The Commission must not only establish that forbearance would not unduly *harm* consumers and competition, it also must find that substantial

competitive *benefits* would arise from forbearance. Verizon has failed to establish such benefits would accrue to the public and, accordingly, the Commission should conclude that the Section 10 standard has not been met.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas	WC Docket No. 06-172

COMMENTS OF BROADVIEW NETWORKS, INC., COVAD COMMUNICATIONS GROUP, NUVOX COMMUNICATIONS, AND XO COMMUNICATIONS, LLC

Broadview Networks, Inc., Covad Communications Group, NuVox Communications and XO Communications, LLC (hereinafter referred to jointly as "Commenters"), through counsel and pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") on January 26, 2007,[1] hereby provide their comments on the petitions filed by Verizon on September 6, 2006 seeking forbearance from certain of the Commission's rules within six Metropolitan Statistical Areas ("MSAs"). Verizon seeks substantial deregulation, pursuant to section 10 of the Communications Act of 1934, as amended ("Act"),[2] within the Boston, New **York,** Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs.[3]

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1 *Wireline Competition Bureau Grunts Extension of Time to File Comments on Verizon's Petifionsfor Forbeurunce in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach Metropolitan Statistical Areas,* WC Docket No. 06-112, Public Notice, DA 07-277 (rel. Jan. 26, 2007).

2 47 U.S.C. § 160

3 The Verizon Petitions request that the Commission forbear from applying to Verizon, within those markets: (1) loop and transport unbundling obligations, under 47 U.S.C. § 251(c) (51 C.F.R. §§ 51.319(a), (b) and (e)); (2) Part 61 dominant carrier tariff requirements (51 C.F.R. §§ 61.32, 61.33, 61.58 and 61.59); **(3)** Part 61 price cap regulations (51 C.F.R. §§ 61.41-61.49); (4) Computer III requirements, including **CEI**

. . .*Continued*

The Commission should summarily dismiss the Verizon Petitions because: (1) carriers' confidential information was unlawfully disclosed to the Commission in the Petitions; (2) Verizon inappropriately relies on the framework employed in the *Omaha Forbearance Order*[4] and parties have been denied the right to use the complete unredacted *Omaha Forbearance Order* to analyze and respond to Verizon's claims; and (3) the "evidence" submitted by Verizon to support its requests is not sufficiently detailed and market-specific to meet its burden of proof. Even if the Commission declines to dismiss the Petitions, which it should not, it ultimately must deny Verizon the forbearance it seeks on the merits because Verizon clearly has not met the statutory prerequisites for forbearance contained in section 10 of the Act.

I. INTRODUCTION

Verizon's Petitions define a new standard for brazen advocacy. Verizon suggests that the Commission need only follow the lead set in its Omaha and Anchorage forbearance proceedings to conclude that forbearance from unbundling and dominant carrier regulations is appropriate for the entire Boston, New **York,** Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs. According *to* Verizon, the New **York** MSA – the largest **MSA** in the United

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and ONA requirements; and (4) dominant carrier requirements, arising under Section 214 of the Act and Part 63 of the Commission's rules, addressing the processes for acquiring lines, discontinuing services, assigning or transferring control and acquiring affiliation (51 C.F.R. §§ 63.03, 63.04, and 63.60-63.66).

4 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area,* Memorandum Opinion and Order, 20 FCC Rcd 19415 *(200.5)("Omaha Forbearance Order"), appeal pending Qwest Corporation v. Federal Communications Commission,* Case No. 05-1450 (D.C. Cir.).

States – and the Philadelphia MSA – the fourth largest MSA in the nation – are "just like" Omaha, Nebraska and Anchorage, Alaska.[5]

Verizon's position is patently absurd. Indeed, Verizon should know better, having been sent a clear signal by the Commission in its Omaha and Anchorage forbearance orders that the Omaha and Anchorage markets presented unique circumstances and that the conclusions reached in those proceedings were not intended to set a precedent for the disposition of future forbearance requests.[6] **As** explained in detail below, Verizon's Petitions are entirely unmoored from the competition and public interest analysis that is the foundation for any review of whether forbearance is justified under section 10. In addition, Verizon's Petitions constitute a blatant attempt to evade the voluntary commitments it made in order to gain approval to merge with MCI as well as a frontal attack on the Commission's recent decision regarding the proper application of the unbundled network element ("UNE") requirements in section 251(c)(3) of the Act.

A little more than a year ago, Verizon agreed, in return for Commission approval of its application to merge with MCI, not to seek increases in any rates for UNEs for a period of two years from the merger closing date.[7] Apparently, in Verizon's view, its commitment not to raise rates for certain services for a certain period of time does not also commit it to refrain from

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5 The Omaha MSA is the 60th largest **MSA** in the nation and the Anchorage **MSA** ranks 138th among the nation's MSAs.

6 *See, e.g., Omaha Forbearance Order,* ¶ 14; *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area,* Memorandum Opinion and Order, WC Docket No. 05-281, ¶ 1 (rel. Jan. 30, 2007) *("Anchorage Forbearance Order").*

7 *See Verizon Communications Inc. and MCI Inc. Applications for Approval of Transfer of Control,* Memorandum Opinion and Order, 20 FCC Rcd 18433, App. G, Unbundled Network Elements, ¶ 1 (2005) *("Verizon-MCI Merger Order").*

attempting to eliminate its obligation to offer those services at all. Not surprisingly, the Commission closed this alleged merger condition loophole in the more-recent AT&T-BellSouth merger proceeding.[8] Notwithstanding the fact that the express terms of the Verizon-MCI merger conditions do not preclude Verizon from filing petitions seeking forbearance from its UNE obligations during the term of its merger commitments, Verizon's attempt to evade its commitment not to raise UNE rates by obtaining forbearance should not be countenanced by the Commission.

Further, the Commission should reject Verizon's attempt to undo the loop and transport UNE rules adopted by the Commission in its *Triennial Review Remand* proceeding.' The Commission's *Triennial Review Remand* UNE rules, which were the product of a comprehensive proceeding with an extensive record, were upheld by the D.C. Circuit less than one year ago. The D.C. Circuit's affirmation of the Commission's UNE rules represented the first time since adoption of the provision in 1996 that the requirements of section 251(c)(3) were not awaiting appellate action or otherwise under attack. Instead of respecting the Commission's interpretation of section 251(c)(3)'s unbundling requirements and the D.C. Circuit's blessing of the Commission's action, Verizon has mounted a campaign to completely undo those requirements throughout six major markets affecting millions of consumers. The Commission should summarily reject this ploy.

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8 *See* Attachment to Letter from Robert W. Quinn, Senior Vice President, AT&T, to Marlene H. Dortch, Secretary, FCC, attached to *FCC Approves Merger of AT&T Inc. and BellSouth Corporation,* FCC Public Notice, Dec. 29,2006, at 2-3, 10.

9 *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* WC Docket Nos. 04-313, 01-338, Order on Remand, FCC 04-290, 20 FCC Rcd 2533 (rel. Feb. 4,2005) *("Triennial Review Remand Order"* or *"TRRO")),affirmed Covad Communications v. FCC, 450* F.3d *528* (D.C. Cir. 2006).

There is a fundamental flaw in the reasoning at the center of Verizon's Petitions. Verizon points to the existence of competition using UNEs as justification for eliminating competitors' access to those same UNEs. Verizon would have the Commission believe that Congress intended to require the unbundling of certain core ILEC facilities and services (*i.e.*, loops and transport circuits) so that competitors could make investments in network facilities and services used in concert with those UNEs but when competitors actually succeeded in competing with Verizon through use of those UNEs, those UNEs could be eliminated. Certainly, that is not what Congress intended. Indeed, the Commission itself has recognized this, holding in the *Anchorage Forbearance Order* that forbearing from section 251(c)(3) where no competitive carrier has constructed substantial competing last-mile facilities is not consistent with the public interest and likely would lead to a substantial reduction in retail competition.''

For all of the reasons outlined in this Section. as well as each of the reasons explained below, Verizon's forbearance requests should be rejected.

II. THE STANDARD FOR ANALYSIS OF SECTION 10 FORBEARANCE REQUESTS IS WELL-ESTABLISHED

Section 10(a) of the Act allows the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or telecommunications

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10 *Anchorage Forbearance Order*, ¶ *23*. *See also Omaha Forbearance Order*, ¶ 64. While it is true that retail competition is a goal of the 1996 Act, it is not the only goal, and a standard that focuses exclusively on retail competition would do so at the expense of Congress's other goals, such as investment in new facilities. Moreover, the relationship between retail competition and unbundling is complex. In many instances, retail competition depends on the use of UNEs and would decrease or disappear without those UNEs. Thus, a standard that eliminates UNEs when a retail competition threshold has been met could be circular. *See, e.g.*, *Review of the Section 251 Unbundling Obligations of Local Exchange Curriers; Implementation of Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand, 18 FCC Rcd 16978 ¶ 141 (2003) (*"Triennial Review Order"* or "*TRO*").

service, or class of telecommunications carriers or telecommunications services, if the Commission determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations . . . *are* just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest."

The D.C. Circuit and the Commission have made it clear that all three prongs of the forbearance standard must be met for forbearance to be permissible.[12] The three prongs are conjunctive and the Commission must deny any petition which fails to satisfy any single prong.[13] In making its determinations, the Commission must consider "whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services."[14]

Further, the burden of proof in a forbearance proceeding rests squarely on the party petitioning for relief.[15] The petitioning party must "provide evidence demonstrating with specificity why [it] should receive relief under the applicable substantive standards."[16] Anecdotes cannot sustain a petitioning party's burden of demonstrating that the regulations or

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11 47 U.S.C. § 160(a)

12 *See Petition for Forbearance From E911 Accurucy Standards Imposed on Tier III Curriers for Locating Wireless Subscribers Under Rule Section 20.18(H)*, Order, 18 FCC Rcd 24648, 24653 (2003) *("E911 Forbearance Order");see also Cellular Telecommunications & Internet Ass'n v. FCC,* 330 F.3d 502,509 (D.C. Cir. 2003).

13 *E911 Forbearance Order*,18 FCC Rcd at 24653.

14 47 U.S.C. § 160(b)

15 *E911 Forbearance Order,* 18 FCC Rcd at 24658.

16 *Id.*

provisions in question are unnecessary and forbearance is consistent with the public interest." Instead, a petitioning party must provide detailed, market-specific evidence. Moreover, as the Commission emphasized in the ***Omaha Forbearance Order,*** it is under no statutory obligation to evaluate a forbearance petition "otherwise than as pled."[18] While general unsupported claims are never sufficient to support forbearance, unsubstantiated claims are especially lacking in situations – like the present case – where the Commission has already found (and been upheld by the courts) that telecommunications carriers are impaired without access to the unbundled loops and dedicated transport from which the petitioning party seeks forbearance.

The Commission has stated repeatedly that each forbearance request "must be judged on its own merits"" and that its forbearance determinations do not result in rules of general applicability.[20] Indeed, the Commission has professed its understanding that forbearance proceedings are not the appropriate context in which to craft any new regulatory tests of general applicability. In the ***Omaha Forbearance Order,*** for instance, the Commission expressly stated:

> We emphasize, however, that in undertaking this analysis, we do not issue any declaratory rulings, promulgate any new rules, or otherwise make any general determinations of the sort we would properly make in a rulemaking proceeding on a fuller record.[21]

Despite such clear statements, Verizon urges the Commission to grant it forbearance on the basis of the "precedent" established in previous forbearance orders. Verizon presents its petitions as requests for "substantially the same regulatory relief the Commission

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17 *Id.*

18 ***Omaha Forbearance Order,*** n. 161.

19 *Id.,* ¶ 2.

20 *Id.* ***See also Anchorage Forbearance Order,*** ¶ *11.*

21 ***Omaha Forbearance Order,*** ¶ 14. ***See also Anchorage Forbearance Order,*** ¶ 11

granted in the *Omaha Forbearance Order*."[22] Indeed, they are filled with citations to the *Omaha Forbearance Order* – there are more than three dozen references to the *Omaha Forbearance Order* in each Verizon Petition – as support for the relief it seeks. Verizon's bootstrapping effort directly contradicts Commission policy and is particularly egregious given the major markets involved and the substantially differing competitive conditions in those markets.

III. VERIZON'S PETITIONS SHOULD BE DISMISSED DUE TO VERIZON'S MISUSE OF CONFIDENTIAL INFORMATION AND THE GROSS INADEQUACIES OF SUPPORTING DATA

Dismissal of Verizon's Petitions outright, as opposed to denying them in due course, is the appropriate course of action because: (1) Verizon inappropriately relies on the framework utilized in the *Omaha Forbearance Order* and interested parties have been denied the right to use the unredacted *Omaha Forbearance Order* to analyze and respond to Verizon's claims; (2) the data submitted by Verizon was unlawfully disclosed to the Commission; and (3) the "evidence" submitted by Verizon to support its requests is not sufficiently detailed and market-specific to meet its burden of proof.

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[22] Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Boston Metropolitan Statistical Area (filed Sept. 6, 2006), at 1; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the New York Metropolitan Statistical Area (filed Sept. 6, 2006), at 1; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Philadelphia Metropolitan Statistical Area (filed Sept. 6, 2006), at 1; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Pittsburgh Metropolitan Statistical Area (filed Sept. 6, 2006), at 1; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Providence Metropolitan Statistical Area (filed Sept. 6, 2006), at 1; Petition of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160 in the Virginia Beach Metropolitan Statistical **Area** (filed Sept. 6, 2006), at 1, WC Docket No. 06-172 (consolidated) (the "Verizon Petitions" or "Petitions").

A. Interested Parties Have Been Denied The Right To Participate Fully In This Proceeding

1. Interested parties have been precluded from using the complete *Omaha Forbearance Order* to respond to Verizon's claims.

As explained above, each forbearance request must be treated on its own merits and must rise or fall based on the particular market circumstances that exist at the time of filing. It is never sufficient for a requesting party to represent that its request should he granted because it is virtually identical to a successful forbearance request made previously by another telecommunications carrier for another market.[23] Yet. that in effect is what Verizon has presented to the Commission. Verizon seeks "substantially the same regulatory relief the Commission granted in the *Omaha Forbearance Order*"[24] on the ground that competition in the Boston, New York, Philadelphia, Pittsburgh, Providence, and Virginia Beach MSAs meets, if not exceeds, the levels found by the Commission in portions of the Omaha MSA when it granted Qwest forbearance in that MSA.[25]

Verizon's attempt to piggy-back regulatory relief on the unique circumstances found to exist in the Omaha **MSA** is particularly inappropriate because interested parties have been precluded from using the confidential data relied upon in the *Omaha Forbearance Order* to analyze and respond to Verizon's claims.[26] This treatment of the *Omaha Forbearance Order*

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23 *See Omaha Forbearance Order*, ¶ 14; *Anchorage Forbearance Order*, ¶ n. 28.

24 *See, e.g.,* Verizon Petition – Boston, at 1.

25 *See, e.g., id.* at 2 ("In fact, competition in the Boston **MSA** is more advanced than it was in Omaha.").

26 Confidential information supporting the Commission's determinations in the *Omaha Forbearance Order* was redacted from the *Order*, and therefore is not available for public inspection and use. *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Protective Order, DA 04-1870, 19 FCC Rcd 11377 (2004) *("Omaha Protective Order")*, at ¶ 7.

significantly impairs the ability of the Commenters and other interested parties to participate fully in the instant proceeding." Recognizing this problem, the Commenters sought an amendment to the *Omaha Protective Order* that would permit the use of confidential information by authorized parties for purposes of analyzing and responding to the Verizon Petitions.[28] To date, the Commission has failed *to* rule on this motion. In the absence of an order by the Commission permitting limited use of the unredacted *Omaha Forbearance Order* in this proceeding, and in light of the fact that Verizon relies heavily on the "standard" employed by the Commission in that order, the Commission must dismiss Verizon's Petitions.

B. Verizon has Unlawfully Disclosed Carrier Proprietary Information

Every local exchange carrier ("LEC") is required by the Commission's rules to be able to deliver 911 calls to the appropriate Public Safety Answering Point ("PSAP").[29] Where E911 capabilities exist, LECs must also deliver callers' names and addresses to the PSAP. To fulfill this obligation, LECs must provide the name, address, and telephone number of each customer to the operator of the E911 database. In five of the six MSAs for which Verizon is seeking forbearance, the PSAP operator is Verizon itself.[30] Consequently, in those five MSAs, Verizon's competitors have entrusted it, pursuant to confidential treatment, with sensitive proprietary data, *i.e.*, their customers' names and contact information.

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27 Specifically, parties are unable to respond substantively to Verizon's attempt to employ the market coverage definitions and competition benchmarks utilized by the Commission in the *Omaha Forbearance Order.*

28 Motion to Modify Protective Order, WC Docket No. 04-223 (filed Oct. 11,2006).

29 *See* 47 C.F.R. §§ 64.3001-64.3002.

30 Verizon was replaced as the PSAP operator in Virginia Beach in March 2005.

Verizon relies, to a significant extent, on information culled from the E911 databases to support all six of its petitions.[31] Verizon analyzed those databases to determine where its competitors are providing service and which consumers have chosen to use a competitor instead of Verizon and used that information as its "proof' that there is sufficient local competition in the enterprise market to justify forbearance.[32]

Verizon is misusing data it obtained exclusively by virtue of its position as the E911 database operator. As identified in the Motion to Dismiss filed by a group of fifteen competitive LECs, "Verizon's use of E911 data for regulatory advocacy is barred by express terms of its interconnection agreements with CLECs."[33] Verizon's interconnection agreements do not authorize any use of confidential information for the purpose of seeking forbearance, or for any regulatory purpose other than enforcement of the interconnection agreement. Further, as noted in the Motion to Dismiss, "Verizon appears to have misappropriated and misused other confidential information in support of its pleading: Verizon relies upon information that it gained under protective order in the Verizon/MCI merger proceeding."[34] Verizon confirms that during the course of the Verizon-MCI merger proceeding it received confidential data that showed competitive local exchange carrier ("CLEC") fiber deployment. Use of this confidential

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31 Notwithstanding the fact that after March 2005 it no longer was the E911 PSAP operator in Virginia Beach, Verizon includes data gleaned from the Virginia Beach database in support of its request for forbearance in that MSA. *See* Verizon Petition for Virginia Beach, at 22 ("Based on the most recent E911 listings data available for the City **of** Virginia Beach and as of December 2005 for other parts of the MSA, competing carriers were using their own switches to serve business lines in [Begin Proprietary] [End Proprietary] percent of the wire centers in the Virginia Beach MSA . . .").

32 *See, e.g., Lew/Verses/Garzillo Decl. –Boston MSA,* at 24 ("Based on Verizon's business E911 listings data as of the end of December 2005, competing carriers are serving business customers in **** **** of the wire centers in the Boston MSA, and these wire centers account for **** **** percent of Verizon's retail switched business lines in the MSA.").

33 Motion to Dismiss, **WC** Docket No. 06-172 (filed Oct. 16, 2006), at 3.

34 ***Id.,*** at 5, quoting paragraph 11 of the *Lew/Verses/Garzillo Decl.-Boston MSA.*

information in the instant forbearance proceedings is not permitted under the terms of the *Verizon-MCI Protective Order* however."

In addition, Verizon's use of proprietary E911 database information violates state law in New Hampshire[36] and Rhode Island. New Hampshire law prohibits Verizon, the entity administering the E911 database in New Hampshire, from using the E911 database for any purpose other than for support of the state's E911 emergency services.[37] Likewise, Rhode Island law prohibits the dissemination of telephone subscriber name, address, and telephone number information contained in the E911 database except for the purpose of handling emergency calls or providing notice of imminent threats to public safety.[38]

Importantly, even if the E911 database information relied upon by Verizon had been lawfully obtained, the Commission should reject its use in this proceeding since E911 listings do not accurately show carriers' actual customers in an MSA. As noted in the accompanying Declaration of Joseph Gillan,[39] because E911 listings are relied upon by providers

35 *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Order Adopting Protective Order, WC Docket No. 05-75, DA 05-647 (rel. Mar. 10, 2005), at 3 ("Persons obtaining access to Confidential Information . . . under this Protective Order shall use the information solely for the preparation and conduct of this license transfer proceeding . . . and, except as provided herein, shall not use such documents or information for any other purpose . . . or in other administrative, regulatory or judicial proceedings.").

36 New Hampshire state law is relevant to the analysis of Verizon's forbearance request for the Boston MSA, as a portion of the Boston MSA is located within the state of New Hampshire.

37 RSA 106-H:9 states in pertinent part: "Neither the department, nor any vendor or any of its employees to whom such information becomes available in the performance of any contractual services for the department shall disclose any information obtained from the department's records, files or returns or from any examination, investigation, or hearing, nor may any such employee or person be required to produce any such information for the inspection of any person or for the use in any action or proceeding except as provided in this paragraph." NH RSA 106-H:9, III.

38 R.I. Gen Laws § 39-21.1-4.

39 *Declaration of Joseph Gillun ("Gillun Declaration")*, attached hereto as Exhibit 1.

of emergency services, there is a presumption that the E911 database can reliably be used as a measure of local competition.[40] That presumption is false. Although considerable effort is undertaken to ''ensure that the E911 database correctly dispatches emergency personnel to the correct physical address, that care does not mean that the database correctly measures lines for the purpose of competitive analysis."[41]

Recent attempts by incumbents in various state proceedings to use E911 database information to quantify local competition have tested the use of E911 database information as a proxy for actual CLEC line counts. These validation efforts have "demonstrated, without exception, that the E911 database systematically overstates the number of lines served by competitors and, as such, [ ] is not a reliable measure of local competition."[42] In New **York,** for example, Verizon recently requested reduced regulation of its retail business services, in part, on an E911-based estimate of business lines services by CLECs in the state. An analysis of E911 data showed, however, that Verizon's E911-based claim significantly exceeded the total number of business lines reported to the FCC *for the **entire state.***[43] In Oklahoma, it was found that E911 database information inflated CLEC lines in the business market between 70% and 115%[44] and, in Kansas, the E911 database inflated the number of business lines actually served by **Cox** by 222%.[45]

Here, Verizon has offered E911-based information purporting to show XO Communications, LLC's ("XO") level of operations within the Boston, New **York,** Philadelphia,

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40 *Gillan Decluration,* at 3

41 *Id.,* at n. 3.

42 *Id.,* at 4.

43 *Id.,* at 7.

44 *Id.,* at 5.

45 *Id.,* at **6.**

and Pittsburgh MSAs. **A** review of this data reveals that the business line counts attributed to XO significantly exceed the actual business line counts recorded by XO's internal **ALI** database.[46] For the New York MSA, Verizon's business line counts for XO are overstated by 43%; for the Boston **MSA,** Verizon's business line counts overstate XO's business lines by 14%; and for the Philadelphia and Pittsburgh **MSAs** combined, Verizon's data overstates XO's business lines by 22%.[47]

In light of the above discussion, the only way to resolve Verizon's forbearance requests fairly is to strike all references to misappropriated and inaccurate E911 data contained in the Petitions and accompanying documentation. Since Verizon surely cannot carry its burden of proof absent this data, the Commission's only reasonable alternative is to dismiss the Petitions and require Verizon to make its case on a new record free from misappropriated and inaccurate information.

C. The Evidence Produced by Verizon Does Not Meet Its Burden of Proof

As noted above, the party requesting forbearance has the burden of proof to show that the regulations or provisions in questions are unnecessary and forbearance is consistent with the public interest. To meet this burden, the petitioner must produce detailed, market-specific evidence for the particular product and geographic markets for which regulatory relief is sought. Verizon has failed miserably to meet its burden. The data contained in Verizon's Petitions and accompanying materials suffers from two principal defects in this regard.

First, the data provided by Verizon in support of its Petitions is largely anecdotal. Verizon urges the Commission to grant forbearance on the basis of promotional materials,

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46 *See Declaration* of *Lisa R.* ***Youngers*** *("Youngers Declaration"),* attached hereto as Exhibit 2, at 2.

47 *Id..* at 3-4

marketing statements, and broad generalizations concerning the state of competition in the particular **MSAs** at issue. Reliance on this type of information to justify forbearance, coupled with an ill-founded reliance on Verizon's competitive predictions concerning the future competitive landscape, would result in a disposition of these petitions that is twice removed from reality.

For example, to support its position that there is sufficient competition by cable providers to justify regulatory relief in the mass market throughout the Boston, New York, Philadelphia, Pittsburgh, and Providence MSAs, Verizon relies predominantly on self-promotional statements by Comcast, such as the following: "The next several years will provide tremendous growth opportunities for Comcast . . . By the end of this year we will be marketing our 'Triple Play' package of video, voice and data services to the majority of our customers."[48] Similarly, in support of its position that there is sufficient competition by cable providers in the mass market throughout the Virginia Beach **MSA,** Verizon merely cites ***Cox's*** claims that its telephone penetration is "the highest among all cable operators."[49] Statements made by

48 *Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Boston Metropolitan Statistical Area* (*Lew/Verses/Garzillo Decl. – Boston MSA"),* at 9-10; *Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the New York Metropolitan Statistical Area* (*Lew/Verses/Garzillo Decl. – New York MSA"),* at 12; *Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Philadelphia Metropolitan Statistical Area* (*Lew/Verses/Garzillo Decl. – Philadelphia MSA*"), at 9-10; *Declaration of Quintin* ***Lew,*** *Judy Verses, and Patrick Garzillo Regarding Competition in the Pittsburgh Metropolitan Statistical Area* (*Lew/Verses/Garzillo Decl. – Pittsburgh MSA*"), at 9; *Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Providence Metropolitan Statistical Area* (*Lew/Verses/Garzillo Decl. – Providence MSA"),* at 10-11.

49 *Declaration of Quintin Lew, Judy Verses, and Patrick Garzillo Regarding Competition in the Virginia Beach Metropolitan Statistical Area* (*Lew/Verses/Garzillo Decl. – Virginia Beach MSA"),* at 9.

Comcast, Cox, and other cable executives at investor conferences[50] and in press releases" round out the picture Verizon sketches of the state of competition by cable-based providers in the six MSAs at issue. Company press releases, investor relations materials, and media reports are not the type of evidence upon which the Commission can base its forbearance determinations however. Verizon's Petitions are completely devoid of the hard data regarding the competitive environment that must be provided by any carrier realistically hoping to gain regulatory relief through the forbearance process. For this reason, Verizon's Petitions should be denied.

The second critical defect in the "proof' submitted by Verizon is that the very limited data regarding the state of competition Verizon has actually produced is not specific enough. This shortcoming renders the data essentially useless to the Commission's forbearance analysis and shows that Verizon has not made the required *primafacie* showing. For example, Verizon has conveniently failed to acknowledge the well-established principle that wire centers arc the relevant geographic market for determining the level **of** competition in a section 251(c)(3) forbearance analysis." Verizon claims that the appropriate geographic market is the entire MSA[53] and the limited empirical data it has submitted in support of its Petitions is presented on

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50 *See, e.g., Lew/Verses/Garzillo Decl. – Boston MSA*, at 9 ("According to its Chairman, Comcast plans to market its voice services to 80 percent of its footprint by the end of 2006."). *See also Lew/Verses/Garzillo Decl. – New* **York** *MSA*, at 12; *Lew/Verses/Garzillo Decl. – Philadelphia MSA*, at 9; *Lew/Verses/Garzillo Decl. – Pittsburgh MSA*, at 10; *Lew/Verses/Garzillo Decl. – Providence MSA*, at 10.

51 *See, e.g., Lew/Verses/Garzillo Decl. – Boston MSA*, at 11-12, quoting an RCN press release regarding the reach of the RCN network in the Boston MSA. *See also Lew/Verses/Garzillo Decl. – New* **York** *MSA*, at 13; *Lew/Verses/Garzillo Decl. – Philadelphia MSA*, at 11.

52 *See Omaha Forbearance Order*, ¶¶ 61-62; *Anchorage Forbearance Order*, ¶ 14 **("As** in the *Qwest Omaha Order*, we conclude that it is appropriate for us to use the wire center service area as the relevant geographic market.").

53 See Verizon Petition – Boston, at 1 ("This forbearance petition seeks in the Boston Metropolitan Statistical Area ("MSA") substantially the same regulatory relief the Commission granted in the *Omaha Forbearance Order*. Throughout this **MSA,** Verizon

. . .*Continued*

an MSA (or more aggregated)[54] basis. Given the existing precedent, Verizon's failure to submit market-specific data at the outset evidences bad faith and an attempt to "game" the forbearance process

In the *Triennial Review Remand Order,* the Commission determined that the proper geographic market for analyzing local competition under section 251(c) is the LEC wire center.[55] In rejecting an MSA-level analysis, the Commission stated:

> **We** recognize that some imperfections are inherent in any approach we might adopt, and conclude that the other proposed geographic tests have greater defects than the one we select . . . an MSA-wide approach relying on objective, readily-available data would alleviate dramatically any concerns regarding administrability, but (as we also describe below) would require an inappropriate level of abstraction, lumping together areas in which the prospects for competitive entry are widely disparate.[56]

Interestingly, Verizon was one of the most vocal proponents of adoption of a wire center-based analysis in the *Triennial Review Remand* proceeding.[57]

Consistent with this standard, in the *Omaha Forbearance Order,* the Commission engaged in a wire center-specific analysis, expressly rejecting an MSA-wide approach.[58] The

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faces competition from a wide range of technologies and an even broader array of providers."). **See** *also* Verizon Petition – New York, at 1; Verizon Petition – Philadelphia, at 1; Verizon Petition – Pittsburgh, at 1; Verizon Petition – Providence, at 1; Verizon Petition – Virginia Beach, at 1.

54 Some of the data proffered by Verizon is nationwide in scope. ***See, e.g.,*** *Lew/Verses/Garzillo Decl. – Boston MSA*, at 9 ("Comcast is providing voice service to more than 1.7 million customers nationwide, and reports that it is adding an average of more than 17,000 customers per week."). ***See*** *also Lew/Verses/Garzillo* Decl. – *New York MSA*, at 9; *Lew/Verses/Garzillo* Decl. – *Philadelphia* ***MSA,*** at 12; *Lew/Verses/Garzillo* ***Decl.*** – *Pittsburgh MSA,* at 10; *Lew/Verses/Garzillo* ***Decl.*** – *Providence MSA*, at 10.

55 ***See*** *Triennial Review Remand Order,* at ¶ 155-56.

56 *Triennial Review Remand Order,* ¶ 155.

57 *Id.* ("Consistent with the position of several incumbent LECs, including Verizon and SBC, we find that the area served by a wire center is the appropriate geographic market.").

Commission found that an MSA-based analysis was inappropriate because "[u]sing such a broad geographic region would not allow us to determine precisely where facilities-based competition exists, which are the only locations in which we have determined that the forbearance criteria of section 10(a) are satisfied with respect to section 251(c)(3) unbundling obligations."[59] This principle was followed in the recently-decided Anchorage forbearance proceeding. There, the Commission granted ACS forbearance from section 251(c)(3) unbundling obligations in five of the 11 wire centers in the Anchorage study area, finding that the level of facilities-based competition in those specific locations will ensure that market forces will protect the interests of consumers.[60] The Commission stated explicitly in the *Anchorage Forbearance Order* that a wire center-based analysis was required because competitive conditions vary across an MSA or a study area, and wire centers "**are** sufficiently small and discrete to enable us to grant forbearance in the geographic areas where the standards of section 10 are satisfied, without being administratively unworkable, as would be the case with a loop-by-loop (or customer-by-customer) analysis."[61]

The *Triennial Review Order* and the Commission's decisions in the Omaha and Anchorage forbearance dockets make it clear that wire center-specific evidence is essential to the Commission's analysis. Verizon has not justified a departure from this well-established principle and, at the same time, it has not provided a scintilla of factual evidence regarding the state of local competition on a wire center-specific basis in the relevant MSAs. In the absence of

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58 *Omaha Forbearance Order,* n. 186.

59 *Id.*

60 *Anchorage Forbearance Order,* ¶¶ 14, 16.

61 *Id.* ¶ 16 (footnotes omitted).